Nos. 14-1468, 14-1470, 14-1507

In the
Supreme Court of the United States

DANNY BIRCHFIELD,
Petitioner,
v.
NORTH DAKOTA,
Respondent.

WILLIAM ROBERT BERNARD, JR.,
Petitioner,
v.
MINNESOTA,
Respondent.

STEVE MICHAEL BEYLUND,
Petitioner,
v.
GRANT LEVI, DIRECTOR, NORTH DAKOTA DEPARTMENT OF TRANSPORTATION,
Respondent.

On Writs of Certiorari to the Supreme Court of North Dakota and the Supreme Court of Minnesota

BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

LISA SORONEN
State & Local Legal Center
444 N. Capitol St., NW
Suite 515
Washington, DC 20001
(202) 434-4845

GREGORY G. GARRE
Counsel of Record
JONATHAN Y. ELLIS
BENJAMIN W. SNYDER
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
Gregory.Garre@lw.com

Attorneys for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTERESTS OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. THE IMPLIED CONSENT LAWS ARE A LONGSTANDING, COMMON SENSE, AND PERMISSIBLE RESPONSE TO THE GRAVE THREAT OF DRUNK DRIVING 6

A. Drivers Must Comply With Myriad, Reasonable Conditions Anytime They Voluntarily Use The Public's Roadways 7

B. Implied Consent Is An Exception To The Fourth Amendment's Warrant Requirement 14

C. The Implied Consent Laws Do Not Impose An Unconstitutional Condition 18

II. SUBJECTING PETITIONERS TO CRIMINAL PENALTIES FOR VIOLATING THE IMPLIED CONSENT LAWS DOES NOT VIOLATE THE FOURTH AMENDMENT 24

TABLE OF CONTENTS—Continued

Page

III. THE IMPLIED CONSENT LAWS PASS THE ULTIMATE FOURTH AMENDMENT TOUCHSTONE OF REASONABLENESS 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

CASES

Agency for International Development v. Alliance for Open Society International, Inc.,
133 S. Ct. 2321 (2013) 19

Barlow v. United States,
32 U.S. 404 (1833) 11

Breithaupt v. Abram,
352 U.S. 432 (1957) 6, 15, 18

Brigham City v. Stuart,
547 U.S. 398 (2006) 18

City of Los Angeles v. Patel,
135 S. Ct. 2443 (2015) 14

Dolan v. City of Tigard,
512 U.S. 374 (1994) 19, 20, 23

Florida v. Jardines,
133 S. Ct. 1409 (2013) 16

Florida v. Jimeno,
500 U.S. 248 (1991) 20

Georgia v. Randolph,
547 U.S. 103 (2006) 16

Koontz v. St. Johns River Water Management District,
133 S. Ct. 2586 (2013) 19

TABLE OF AUTHORITIES—Continued

Page(s)

Landmark Communications, Inc. v. Virginia,
435 U.S. 829 (1978) 27

Mackey v. Montrym,
443 U.S. 1 (1978) 6, 20, 23

Michigan Department of State Police v. Sitz,
496 U.S. 444 (1990) 19, 22

Missouri v. McNeely,
133 S. Ct. 1552 (2013) ..... *passim*

Schmerber v. California,
384 U.S. 757 (1966) 5, 21, 28

Schneckloth v. Bustamonte,
412 U.S. 218 (1973) 7, 11, 14, 21

Skinner v. Railway Labor Executives' Association,
489 U.S. 602 (1989) 20

South Dakota v. Neville,
459 U.S. 553 (1983) ..... *passim*

United States v. Biswell,
406 U.S. 311 (1972) 17

United States v. Drayton,
536 U.S. 194 (2002) 21

United States v. Matlock,
415 U.S. 164 (1974) 16

TABLE OF AUTHORITIES—Continued

Page(s)

Whren v. United States,
517 U.S. 806 (1996) 10

Winston v. Lee,
470 U.S. 753 (1985) 28

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. XVIII 25

18 U.S.C. § 3118 5

Minn. Stat. § 169.06(4) 8

Minn. Stat. § 169.09(3) 9

Minn. Stat. § 169.14 8

Minn. Stat. § 169.49 9

Minn. Stat. § 169.50 9

Minn. Stat. § 169.57(2) 9

Minn. Stat. § 169.60 9

Minn. Stat. § 169.475 9

Minn. Stat. § 169.685(5) 9

Minn. Stat. § 169.686 9

Minn. Stat. § 169.791(2) 8

TABLE OF AUTHORITIES—Continued

Page(s)

Minn. Stat. § 169A.03 25

Minn. Stat. § 169A.20(2) 22, 25

Minn. Stat. § 169A.20(5) 25

Minn. Stat. § 169A.26 25

Minn. Stat. § 169A.51(1) 10, 20

Minn. Stat. § 169A.51(1)(a) 22

Minn. Stat. § 169A.51(2) 12

Minn. Stat. § 169A.51(3) 20

Minn. Stat. § 169A.275 25

Minn. Stat. § 169A.276 25

Minn. Stat. § 171.02 8

Minn. Stat. § 171.03 8

Minn. Stat. § 171.07(1)(a) 15

Minn. Stat. § 171.08 8

Minn. Stat. § 171.13 ..... 8, 12

N.D. Cent. Code ch. 39-10 8

N.D. Cent. Code § 39-06-01 8

N.D. Cent. Code § 39-06-02 8

TABLE OF AUTHORITIES—Continued

Page(s)

N.D. Cent. Code § 39-06-13 ..... 8, 12

N.D. Cent. Code § 39-06-14(2) 15

N.D. Cent. Code § 39-06-16 8

N.D. Cent. Code § 39-08-01(1)(a) 25

N.D. Cent. Code § 39-08-01(1)(e) 22, 25

N.D. Cent. Code § 39-08-01(2) 25

N.D. Cent. Code § 39-08-01(5) 25

N.D. Cent. Code § 39-08-01(5)(a)(1) 25

N.D. Cent. Code § 39-08-01(5)(b) 12

N.D. Cent. Code § 39-08-06 9

N.D. Cent. Code § 39-08-20 8

N.D. Cent. Code § 39-08-23 9

N.D. Cent. Code § 39-09-02 8

N.D. Cent. Code § 39-16.1-11 8

N.D. Cent. Code § 39-20-01(1) 10, 20, 22

N.D. Cent. Code § 39-20-01(2) 10

N.D. Cent. Code § 39-20-01(3)(a) 12

N.D. Cent. Code § 39-20-01.1 10

TABLE OF AUTHORITIES—Continued

Page(s)

N.D. Cent. Code § 39-21-03(2) 9

N.D. Cent. Code § 39-21-04(1) 9

N.D. Cent. Code § 39-21-06 9

N.D. Cent. Code § 39-21-19 9

N.D. Cent. Code § 39-21-41.2 9

N.D. Cent. Code § 39-21-41.4 9

OTHER AUTHORITIES

Tony Dutzik & Phineas Baxandall, U.S. PIRG Education Fund, Frontier Group, *A New Direction: Our Changing Relationship with Driving and the Implications for America's Future* (2013) 13

1 Wayne R. LaFave, *Search & Seizure* (5th ed.), Westlaw (database updated Oct. 2015) 16

National Highway Traffic Safety Administration, U.S. Department of Transportation, DOT HS 812 102, *Traffic Safety Facts: Alcohol-Impaired Driving* (2014), http://www-nrd.nhtsa.dot.gov/Pubs/812102.pdf 21

TABLE OF AUTHORITIES—Continued

Page(s)

National Highway Traffic Safety Administration, U.S. Department of Transportation, *The Economic and Societal Impact of Motor Vehicle Crashes, 2010 (Revised)* (2015), http://www-nrd.nhtsa.dot.gov/pubs/812013.pdf 7

Michael Sivak & Brandon Schoettle, *Update: Percentage of Young Persons With a Driver's License Continues to Drop*, 13 Traffic Injury Prevention 341 (2012) 13

Robert B. Voas et al., *Implied-Consent Laws: A Review of the Literature and Examination of Current Problems and Related Statutes*, 40 J. Safety Research 77 (2009) 28, 29

INTERESTS OF AMICI CURIAE[1]

Amici are organizations that represent the interests of state and local governments.

The Council of State Governments (CSG) is the Nation's only organization serving all three branches of state government. CSG is a region-based forum that fosters the exchange of insights and ideas to help state officials shape public policy. This forum offers unparalleled regional, national, and international opportunities to network, develop leaders, collaborate, and create problem-solving partnerships.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the Nation's 3,069 counties through advocacy, education, and research.

The National League of Cities (NLC) is the oldest and largest organization representing municipal governments throughout the United States. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance. Working in partnership with 49 state municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents.

---

[1] No counsel for a party authored this brief in whole or in part; and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *amici*, their members, and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have provided consent to this filing, in letters that have been lodged with the Clerk of the Court.

The U.S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in USCM by its chief elected official, the mayor.

The International City/County Management Association (ICMA) is a non-profit professional and educational organization consisting of more than 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments over the world.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 3,000 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

Amici are all too familiar with the impact of drunk driving on American communities, families, and citizens. Together, *amici* have helped state and local governments to develop strategies for preventing drunk driving that fit local needs and conditions—strategies that include implied consent laws like the ones at issue here. A decision holding that such laws are unconstitutional would deny state and local governments a longstanding and critical tool in their ongoing efforts to combat drunk driving.

SUMMARY OF ARGUMENT

These cases come to this Court against the backdrop of three undeniable facts. First, drunk driving imposes a terrible toll on America, killing

thousands and shattering the lives of tens of thousands of others each year. Second, for decades, "all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to [blood-alcohol] testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense." *Missouri v. McNeely*, 133 S. Ct. 1552, 1566 (2013) (plurality op.). And third, this Court for decades has viewed these laws as "unquestionably legitimate." *South Dakota v. Neville*, 459 U.S. 553, 560 (1983). Petitioners' argument that these important laws have been unconstitutional all along, under a Fourth Amendment theory, should be rejected.

Implied consent laws do not impermissibly burden motorists' Fourth Amendment rights. Consent is a well-forged exception to the warrant requirement. And contrary to petitioners' claims, there is nothing unusual about consent being implied through conduct rather than expressed through words. Just as a homeowner who opens a path from the sidewalk to the door impliedly consents to the police walking that path in accordance with local customs, so too does the homeowner who ventures out onto the highway impliedly consent to a blood-alcohol test required by state law as a condition of using the roads. Nor can petitioners vitiate consent by claiming that they did not *know* about the implied consent laws. Ignorance of the law is not a defense to speeding, or any other law, and it is not a defense to the laws at issue here.

Petitioners invoke the "unconstitutional conditions" doctrine to argue that this consent is unconstitutionally extracted. But that argument flunks both the "essential nexus" and "rough proportionality" factors

that this Court has looked to in applying the doctrine. There can be no serious dispute about nexus. The condition these laws impose (consent to a minimally invasive blood-alcohol test) directly advances a powerful government interest (saving lives) and has a strong connection to the privilege conferred (permission to drive). Nor can there be any real dispute about proportionality: whereas the laws typically require no more than a few breaths into a tube, the costs of drunk driving are staggering.

Petitioners emphasize that the penalties at issue in the case are criminal, but—while it is up to each State to decide what penalty is appropriate—there is no basis for this Court to draw a distinction between implied consent laws that impose administrative versus criminal penalties. The chosen penalty is not a part of the *condition*—it is the means of *enforcing* the condition. No one is forced to agree to go to prison in order to get a driver's license. And it makes perfect sense to equalize the penalty for reneging consent with the penalty that the driver is trying to *avoid* by refusing to take the test. Otherwise, the State would just be creating an incentive to refuse the test, and reducing the deterrent effect of its drunk-driving laws.

Prohibiting States from doing anything more than suspending a driver's license when a motorist withdraws consent after being pulled over for drunk driving would also give drivers, in effect, a free pass. Rather than being forced to make clear up front that they are unwilling to accept the State's (constitutional) condition for using the State's roads, drivers could simply take the license knowing that the worst thing that will happen to them if they refuse a test is that they will be placed in the same position they would

have been in had they been forthright about their unwillingness to accept the condition in the first place, and been denied a driver's license to begin with.

The implied consent laws also pass the Fourth Amendment's ultimate touchstone of reasonableness. Indeed, implied consent laws were enacted to allow States to enforce their drunk-driving laws without having to resort to forced, non-consensual blood draws to collect evidence. And the facts that these laws have been in effect across the Nation for decades, and that this Court has repeatedly upheld them against challenge and referred to them only in approving terms, underscores their reasonableness. Petitioners have provided no basis for this Court to suddenly reverse course and deny the States this longstanding and critical tool in the fight against drunk driving.

ARGUMENT

Implied consent laws like the ones at issue in these cases have existed in this country for half a century. All fifty States and the federal government have adopted some version of these laws. *See Missouri v. McNeely*, 133 S. Ct. 1552, 1566 (2013) (plurality op.); 18 U.S.C. § 3118. Passed in the wake of this Court's decision in *Schmerber v. California*, 384 U.S. 757, 771 (1966), as an alternative to forcing blood draws for alcohol tests, the laws serve as a vital weapon in these States' and the federal government's ongoing battle against drunk driving—a threat that claims thousands of lives each year and injures tens of thousands more.

This Court has heard, and rejected, prior constitutional challenges to these laws. *See, e.g.*, *South Dakota v. Neville*, 459 U.S. 553, 559, 563-64 (1983) (upholding South Dakota's implied consent law against

a Fifth Amendment challenge); *Mackey v. Montrym*, 443 U.S. 1, 3, 18-19 (1978) (upholding Massachusetts's implied consent law against a due process challenge); *see also Breithaupt v. Abram*, 352 U.S. 432, 435 n.2 (1957) (approving of Kansas's implied consent law). And just three Terms ago, a plurality of the Court expressly endorsed these laws as valid and effective "legal tools to enforce ... drunk-driving laws and to secure [blood-alcohol] evidence without undertaking warrantless nonconsensual blood draws." *McNeely*, 133 S. Ct. at 1566.

These cases are different in two principal respects. First, petitioners ground their claims in the Fourth Amendment. And, second, they focus their challenges on implied consent laws that trigger criminal penalties, as opposed to only administrative and civil penalties. Neither distinction justifies an about-face by this Court on the validity of these longstanding laws. The Fourth Amendment, with its over-arching "reasonableness" requirement and well-settled "consent" exception, is an unlikely provision for invalidating these laws, especially compared to the Fifth Amendment and Due Process Clause. And there is no basis for drawing a constitutional line between penalizing drivers by taking away their licenses and penalizing them in the same way they would be for the offense for which they are trying to evade prosecution by reneging on their consent. The judgments below should be affirmed.

I. THE IMPLIED CONSENT LAWS ARE A LONGSTANDING, COMMON SENSE, AND PERMISSIBLE RESPONSE TO THE GRAVE THREAT OF DRUNK DRIVING

It is common ground that, under the Fourth Amendment, a search generally must be accompanied

by a warrant. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). But it is also beyond dispute that one of the "well settled" exceptions to the warrant requirement "is a search that is conducted pursuant to consent." *Id.* In each of the consolidated cases, the State plainly required consent to a blood-alcohol test from anyone who chose to operate a motor vehicle on public roads. Each petitioner accepted the terms of those laws when they voluntarily took to the roads. There is nothing remarkable about implying such consent. There is nothing unconstitutional about that condition in the abstract. And there is nothing problematic about enforcing that commitment here.

A. Drivers Must Comply With Myriad, Reasonable Conditions Anytime They Voluntarily Use The Public's Roadways

1. Driving is an integral part of our country's transportation system and way of life, but there is no denying it is a highly dangerous activity. Anyone who gets behind the wheel of a 4000-pound mass that moves at speeds of up to 70 miles per hour (and beyond) poses a threat not just to the operators of the vehicles, but to all motorists, pedestrians, and property along their way. In 2010, 32,999 people died in automobile accidents on the Nation's roads, another 3.9 million people were injured, and 24 million vehicles were damaged. National Highway Traffic Safety Administration, U.S. Department of Transportation, *The Economic and Societal Impact of Motor Vehicle Crashes, 2010 (Revised)* 1 (2015), http://www-nrd.nhtsa.dot.gov/pubs/812013.pdf. These losses and injuries impose devastating and multifaceted costs on American families, communities, and States.

Understandably, all States condition use of public roadways on an extensive set of rules designed to promote public safety. To be on the roads at all, every driver generally must have a valid license. *See, e.g.*, Minn. Stat. §§ 171.02, 171.03; N.D. Cent. Code §§ 39-06-01, 39-06-02. To obtain such a license from the State of Minnesota, an individual must submit to an examination that includes a test of the applicant's "knowledge of ... traffic laws [including] the legal penalties and financial consequences resulting from violations of laws prohibiting the operation of a motor vehicle while under the influence of alcohol," and any "other physical and mental examinations as the [Commissioner of Public Safety] finds necessary." Minn. Stat. § 171.13. The requirements for a North Dakota license are nearly identical. *See* N.D. Cent. Code § 39-06-13.

As any driver well knows, once on the roads themselves, the requirements and conditions imposed by the States are similarly comprehensive. All drivers must carry their licenses "in the[ir] immediate possession at all times" and "shall physically surrender [it] upon demand of any court, police officer, or a field deputy or inspector." N.D. Cent. Code § 39-06-16; *see also* Minn. Stat. § 171.08. They are required to carry liability insurance, and be ready to produce proof of that insurance on command at any time. *See* Minn. Stat. § 169.791(2); N.D. Cent. Code §§ 39-08-20, 39-16.1-11. And they must abide by all the "general rules of the road," N.D. Cent. Code ch. 39-10, like speed limits, traffic lights, and traffic signs. *See, e.g.*, Minn. Stat. §§ 169.06(4), 169.14; N.D. Cent. Code § 39-09-02.

Every motor vehicle must be equipped with, among other things, headlights, tail lights, and turn signals of

a specific brightness, color, and often height. *See, e.g.*, N.D. Cent. Code § 39-21-03(2) (headlights must be "at a height . . . not more than fifty-four inches nor less than twenty-four inches"); *id.* § 39-21-04(1) (tail lights must "emit a red light plainly visible from a distance of one thousand feet"); *id.* §§ 39-21-06, 39-21-19 (front turn signals must "display a white or amber light . . . visible from a distance of not less than three hundred feet"; rear turn signals "red or amber" and visible from the same distance); *see also* Minn. Stat. §§ 169.49, 169.60 (headlights); *id.* § 169.50 (tail lights); *id.* § 169.57(2) (turn signals).

Drivers and front-seat passengers must always "buckle up"—a requirement that initially was viewed as a significant restraint on personal freedom (if not an outright "seizure") but has been accepted as its safety benefits have become clear. *See* Minn. Stat. § 169.686; N.D. Cent. Code § 39-21-41.4. Children must ride in specialized car seats. *See* Minn. Stat. § 169.685(5); N.D. Cent. Code § 39-21-41.2. Drivers are prohibited from using smart phones to compose, read, or send text messages or emails while driving—even at stop lights—except in cases of emergency. *See* Minn. Stat. § 169.475; N.D. Cent. Code § 39-08-23. In the case of an accident, they must provide the other individuals involved with their name, address, license, registration, and insurance information—and render to any injured person "reasonable assistance." Minn. Stat. § 169.09(3); N.D. Cent. Code § 39-08-06.

A list of similar requirements, rules, and conditions could go on and on. Little wonder that the Court has previously described the use of automobiles as "so heavily and minutely regulated that total compliance with traffic and safety rules is nearly impossible."

Whren v. United States, 517 U.S. 806, 810 (1996). Indeed, there may be no other activity in which so many Americans so regularly engage that is so closely regulated. Every day Americans commit themselves to be bound by these rules and regulations when they get behind the wheel—to protect their own safety as well as the safety of those they will come across.

2. The cases under review challenge just one of these myriad conditions adopted in *every* State to enhance safety on our Nation's roads—the condition that anyone operating a motor vehicle on public roads consent to a blood-alcohol test where there is probable cause to believe they were driving under the influence of alcohol. *See* N.D. Cent. Code §§ 39-20-01(1), (2), 39-20-01.1; Minn. Stat. § 169A.51(1). In the abstract, that hardly seems like an unreasonable trade-off. And, in most respects, this condition is not meaningfully different than the hundreds of others drivers are bound to follow every day. Any time an individual voluntarily takes to the roads, he is required to abide by the condition imposed by these laws as with all the others—and thus he voluntarily consents (and agrees not to withdraw that consent) to blood-alcohol tests on the laws' terms.

It is true, of course, that this condition, unlike many (though not all) of the others listed above, implicates the Fourth Amendment rights of drivers to be free from unreasonable searches. There is no dispute that the blood-alcohol tests these laws require are "searches" within the meaning of the Fourth Amendment—whether they involve breathing into a tube or drawing blood. Thus, to be lawful in the absence of a warrant or some other exception, the tests must be performed pursuant to consent "voluntarily

given, and not the result of duress or coercion, express or implied." *Schneckloth*, 412 U.S. at 248.

But there is no basis to conclude that the implied consent given here was anything but voluntary. No State forces anyone to drive on their public roads. And no petitioner claims—nor offers any reason to believe—that the circumstances he faced here were unique in that respect. Indeed, despite their insistence that consent be determined by "careful scrutiny of all the surrounding circumstances," Birchfield Br. 21 (citation omitted), they offer virtually no details about their specific circumstances at all. By all appearances, petitioners enjoyed the privilege of driving on North Dakota's and Minnesota's public roads on their own volition. And because they did, they were bound to abide by the rules and conditions that come with enjoying that privilege, including consenting to and promising not to withdraw consent to blood-alcohol tests in the circumstances presented here.

Petitioners protest that all drivers may not know of each State's implied consent laws when they enter its public roadways—though they conspicuously fail to claim that was true here. *See id.* at 22. But it has long been settled that individuals are presumed to know the laws that govern their conduct. *See Barlow v. United States*, 32 U.S. 404, 411 (1833) (describing the "whole course of the jurisprudence, criminal as well as civil, of the common law" as establishing the point). Petitioners offer no reason to abandon that ancient principle. And they are no more free to claim that they did not know of the condition at issue than they are to claim that they did not know it was against the law to "text while driving."

Indeed, "ignorance of the law" is a particularly weak excuse in this context and for these petitioners. In order to legally drive at all, States generally require their citizens to pass an examination specifically testing their knowledge of the traffic laws, as is true in both these States. *See* Minn. Stat. § 171.13; N.D. Cent. Code § 39-06-13. Every State in the country has adopted a similar requirement of implied consent to blood-alcohol tests.[2] And this Court itself has repeatedly referred to these laws in its publicly available decisions in approving terms.

For their part, petitioners are presumably well-aware of the consent required by their States' laws. Bernard has four drunk-driving convictions since 2006. *See Bernard* Pet. App. 4a & n.1. Both Beylund and Birchfield appear to be repeat offenders as well. *See Beylund* Br. 3 (citing applicable administrative sanction pertaining to offenders with prior suspensions); *Birchfield* Pet. App. 20a (imposing minimum sentence applicable to second-time offenders); *see also* N.D. Cent. Code § 39-08-01(5)(b). The arrests that initiated these cases were not the first time petitioners heard the implied consent advisory required by these laws. *See* N.D. Cent. Code § 39-20-01(3)(a); Minn. Stat. § 169A.51(2).

Petitioners emphasize that consent is required by a "statutory scheme." *See* Birchfield Br. 21-22 ("Consent is no consent at all if the person giving it is forbidden from declining ...."). That is true, but beside the

---

[2] For that reason, ignorance of the law is as unavailing for the driver who crosses state lines as the driver who stays in State. *Cf.* Birchfield Br. 22. In any event, petitioners in these challenges were stopped while driving only within their own State.

point. No one is "forbidden from declining." Consent is required only of individuals who *choose* to drive on public roads in North Dakota and Minnesota, just like subjecting oneself to examination is required for the same privilege or consent to a search of one's person and luggage is required only of individuals who choose to board an airplane. The salient point is that, while no one disputes the importance of driving to many, no one is *required* to drive. As long as the decision to drive, or not, is voluntary, so is the consent that follows.

Petitioners assert that, even if consent follows from the act of driving, driving itself is simply too important a privilege for anyone to avoid—thus vitiating any consent. *See id.* at 22-23. While no one disputes the importance of driving to many if not most Americans, this argument cannot be accepted. For starters, while the strong majority of Americans older than 16 years do, millions of Americans do not. Public transportation systems continue to improve across the country. Millions of Americans have taken to using alternatives like Uber. And, in fact, recent studies indicate that driver's licenses are on the decline across the country among nearly all age groups.[3] The fact that millions of

---

[3] *See, e.g.*, Michael Sivak & Brandon Schoettle, *Update: Percentage of Young Persons With a Driver's License Continues to Drop*, 13 Traffic Injury Prevention 341, 341 (2012) (noting a recent reduction in the "proportionate number of driver's licenses for people of all ages (except for small increases for those between 25 and 29, and over 70)"); *see also* Tony Dutzik & Phineas Baxandall, U.S. PIRG Education Fund, Frontier Group, *A New Direction: Our Changing Relationship with Driving and the Implications for America's Future* 1 (2013) ("The Driving Boom is over.").

Americans choose *not* to drive alone defeats this argument, at least as a general matter.

Moreover, the millions of Americans who do choose to drive are not actually coerced, "by implied threat or covert force," into doing so. *Schneckloth*, 412 U.S. at 228. (Anyone who claims otherwise is free to argue that they have been coerced based on particular facts or circumstances not presented here.) And petitioners' argument—that the "practical necessity" of driving makes any conditions on that privilege coercive—would apply not only to implied consent laws with criminal enforcement mechanisms, but also (indeed, *especially*) to laws that punish refusal to submit to a test by suspending a driver's license. But this Court has described such laws as "unquestionably legitimate," recognizing that a hard choice is not the same as coercion. *Neville*, 459 U.S. at 564.

Of course, there remains the question—addressed in Part I.C. below—whether requiring voluntary consent to a blood-alcohol test impermissibly burdens petitioners' Fourth Amendment rights. But there is no serious question that, on the facts here, petitioners voluntarily provided the required consent.

B. Implied Consent Is An Exception To The Fourth Amendment's Warrant Requirement

That consent justifies a warrantless search under the Fourth Amendment. Consent is a "well settled" exception to the Fourth Amendment's warrant requirement. *Schneckloth*, 412 U.S. at 219; *see City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2454 (2015). Petitioners make much of the fact that, under these laws, consent is "implied" (at least in the first instance) through conduct—*i.e.*, by driving on public roads—not

provided expressly in written or verbal form. But implied consent is still consent, and there is no reason that consent cannot be implied through conduct.[4]

This Court long ago recognized that "[i]t might be a fair assumption that a driver on the highways, in obedience to a policy of the State, would consent to have a blood test made as a part of a sensible and civilized system protecting himself as well as other citizens not only from the hazards of the road due to drunken driving, but also from some use of dubious lay testimony." *Breithaupt*, 352 U.S. at 435 n.2. There, the Court was referring to the fact that consent might be implied in the abstract. Here, it is certainly "fair" to imply consent in accordance with an explicit condition of which all residents are presumed to be aware.

Contrary to petitioners' assertion, implying consent is by no means foreign to this Court's Fourth Amendment jurisprudence. Birchfield Br. 26. The Court has, for instance, recognized implied consent to enter for law enforcement purposes the

---

[4] It is also far from clear that the consent is not in fact express in many if not most cases. For example, most if not all States, including Minnesota and North Dakota, require applicants to actually *sign* their driver's licenses. *See* Minn. Stat. § 171.07(1)(a) ("No license is valid unless it bears the usual signature of the licensee."); N.D. Cent. Code § 39-06-14(2) (same). That signature is fairly viewed as express consent to abide by the legal requirements for driving in the State. In addition, some States actually reiterate the "implied consent" requirement on the license itself. The back of a driver's license in Maryland, for example, states that, "[d]riving in Maryland implies consent to chemical testing for intoxication as required by law. Longer license suspensions may result from refusal to be tested." Surely that statement, coupled with an applicant's signature on the front side of the license, amounts to express consent.

constitutionally protected areas around one's *home*—one of the places where the Fourth Amendment's protections apply with the greatest force. In *Florida v. Jardines*, "it [wa]s undisputed that the detectives had . . . [entered] the constitutionally protected extension of Jardines' home" without express consent of any kind. 133 S. Ct. 1409, 1415 (2013). Yet the Court went on to consider "whether he had given his leave . . . implicitly . . . for them to do so." *Id.* "A license may be *implied* from the habits of the country," it explained. *Id.* (emphasis added) (citation omitted); *see also* 1 Wayne R. LaFave, *Search & Seizure* § 2.3(c) (5th ed.), Westlaw (database updated Oct. 2015) ("[C]ourts have held 'that police with legitimate business may enter the areas of the curtilage which are impliedly open to use by the public . . . .'" (citation omitted)).

The entire Fourth Amendment doctrine of third-party consent is based on similar "assumptions" and "common understandings" about social arrangements—concepts far more abstract than the concrete terms on which consent is implied under the laws at issue here. *See, e.g., Georgia v. Randolph*, 547 U.S. 103, 111 (2006) ("[S]hared tenancy is understood to include an 'assumption of risk,' on which police officers are entitled to rely . . . ."); *United States v. Matlock*, 415 U.S. 164, 171 n.7 (1974) ("[I]t is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.").

Petitioners are thus incorrect when they argue that the "only circumstances in which this Court has ever accepted a version of 'implied' consent under the Fourth Amendment is in the administrative inspection

context." Birchfield Br. 26. Indeed, the Court's administrative inspection cases do not turn on consent in the relevant sense at all. Those cases define a distinct exception to the warrant requirement. *See id.* at 28. Where it applies, "the legality of the search depends *not* on consent," but on the authority of the regulatory regime. *United States v. Biswell*, 406 U.S. 311, 315 (1972) (emphasis added). For that reason, petitioners' extended discourse about the various intricacies and requirements of the administrative search doctrine is largely irrelevant. *See* Birchfield Br. 26-29.

Petitioners contend that "allowing implied-consent statutes to constitute a per se, categorical exception to the warrant requirement would make a mockery" of this Court's consent cases. *Id.* at 25 (citation omitted). But no one is arguing for a *per se*, categorical exception to the warrant requirement—or even a particularly broad exception—here. Accepting implied consent like the sort at issue in these cases will not give States free reign to require such consent for any and all searches as a condition of enjoying any and all privileges. . The implied consent laws at issue here are precisely tailored to the problem at hand—drunk driving.

Even where States have an absolute right to deny a privilege or benefit, this Court's "unconstitutional conditions" doctrine (discussed next) prohibits them from conditioning access to those privileges or benefits on unrelated or unreasonable conditions, including implied consent to unrelated or unreasonable searches. They could not, for example, condition driving on consent to a search of one's home (or even the trunk of one's car), as it would have no general relation to the privilege at issue. Nor could they condition driving on

consenting to a wide-ranging search of an individual's DNA, as the intrusion of privacy such a search would entail would far exceed any value gained in ensuring the safety of the roads. The implied consent laws at issue here, by contrast, are limited to a narrow context, in which the State's interests are particularly strong and carefully limited to the threat at hand.

Ultimately, the "touchstone of the Fourth Amendment is 'reasonableness.'" *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). Implying consent in this context is plainly reasonable. Indeed, this Court observed decades ago that implying such consent would be "sensible and civilized," especially given "the hazards of the road due to drunken driving." *Breithaupt*, 352 U.S. at 435 n.2. Decades of the use and societal acceptance of these laws make them only more "sensible and civilized" today. And the "hazards" of drunk driving have not diminished in the 50-plus years since the Court made that remark—to the contrary, they have only come into sharper focus.

C. The Implied Consent Laws Do Not Impose An Unconstitutional Condition

1. The only remaining question is whether the implied consent laws nevertheless place an unconstitutional *condition* on the exercise of Fourth Amendment rights. Relying on a pair of nearly thirty-year-old law review articles, petitioners argue that "the 'government may not grant a benefit on the condition that the beneficiary surrender a constitutional right.'" Birchfield Br. 33 (quoting law review article). But as petitioners themselves seem to acknowledge, that is a gross oversimplification. The "unconstitutional conditions" doctrine does not prohibit every condition on a privilege that might "pressure" or

"induce" a person to give up what would otherwise be a constitutional right, *id.* (citation omitted); rather, the doctrine prohibits only those conditions that "*coerc[e]* people into giving them up." *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013) (emphasis added).

At times, some Members of the Court have seemed to adopt the view that to violate this doctrine a condition must be "actually coercive, in the sense of an offer that cannot be refused." *Agency for Int'l Dev. v. Alliance for Open Society Int'l, Inc.*, 133 S. Ct. 2321, 2328 (2013). There is no such *actual* coercion here. *See supra* at 12-14. But, in other instances, the Court has held that a condition may impose "the type of coercion that the unconstitutional conditions doctrine prohibits," *Koontz*, 133 S. Ct. at 2594, if there is not (1) "an essential nexus" between a "legitimate state interest" that the State seeks to advance and the condition it requires, *Dolan v. City of Tigard*, 512 U.S. 374, 387 (1994) (citation omitted), and (2) a "rough proportionality" between what the condition requires of an individual and the "nature and extent" of the potential costs of the privilege the individual seeks to enjoy, *id.* at 391. Those criteria are met here too.

2. The laws at issue easily satisfy both the "essential nexus" and "rough proportionality" factors.

a. There is no question that ensuring the safety of the roads from the undeniable and incalculable harms of drunk driving is a legitimate state interest. Indeed, as this Court has repeatedly recognized, it is a *compelling* one. *See, e.g.*, *McNeely*, 133 S. Ct. at 1565; *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 451 (1990) ("No one can seriously dispute the magnitude of the drunken driving problem or the State's interest in

eradicating it."); *Mackey*, 443 U.S. at 17 (recognizing the "paramount interest the Commonwealth has in preserving the safety of its public highways . . . [by] removing drunken drivers").

Requiring consent to a blood-alcohol test and a promise not to withdraw that consent where an officer has probable cause to suspect drunk driving is directly related to advancing that compelling interest. Indeed, as is evident from their name, blood-alcohol tests are specifically tailored to find evidence of drunk driving—without revealing additional details about the individual. Breath tests are preferred under the Minnesota law, *see* Minn. Stat. § 169A.51(3),[5] and they are incapable of ascertaining anything other than the presence of alcohol or other controlled substances in the bloodstream. *See Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 626-27 (1989). And, while a blood or urine sample could theoretically be used to discover additional details about a person, the only purpose for which consent is required is to "determin[e] the presence of alcohol" or other controlled substance. Minn. Stat. § 169A.51(1); N.D. Cent. Code § 39-20-01(1); *see Florida v. Jimeno*, 500 U.S. 248, 251 (1991) (a consent search is limited to what the "typical reasonable person" would understand as the scope of the consent).

The fact that a State may be able to *force* blood-alcohol tests by obtaining a warrant or demonstrating an exigency based on the particular facts at hand does

---

[5] No action may be taken against a person under the Minnesota law who refuses to take a blood or urine test, unless an alternative test was also offered. Minn. Stat. § 169A.51(3). No alternative to the breath test must be offered. In *Bernard*, the officer requested a breath test only. *See Bernard* Pet. App. 4a-5a.

not mean that it lacks a legitimate interest in securing *prior* consent. The existence of implied consent advances the State's interest in ensuring that it can test the blood alcohol levels of drivers whom officers have probable cause to believe are intoxicated, without having to worry about the time needed to obtain a warrant at 2 a.m. or any number of other factors.

The Court has never held that a consent search is impermissible whenever a warrant might otherwise be obtained. To the contrary, the Court has recognized "a search pursuant to consent may result in considerably less inconvenience for the subject of the search, and, properly conducted, is a constitutionally permissible and wholly legitimate aspect of effective police activity." *Schneckloth*, 412 U.S. at 228. "In a society based on law, the concept of agreement and consent should be given a weight and dignity of its own." *United States v. Drayton*, 536 U.S. 194, 207 (2002).

b. The required condition—consenting to a blood-alcohol test to detect drunk driving and promising not to withdraw that consent where an officer has probable cause of drunk driving—is also, at the least, roughly proportional to the harm it is designed to prevent. Typically, the laws require no more than several breaths into a tube. And even the most invasive test at issue in these cases—a blood test—is a routine procedure that is "safe, painless, and commonplace." *Neville*, 459 U.S. at 563; *see also Schmerber*, 384 U.S. at 771 ("[F]or most people the procedure involves virtually no risk, trauma, or pain."). The burden the States are imposing is minimal.

The costs of drunk driving, by contrast, are staggering. On average, drunk driving claims a life every 52 minutes in the United States. *See* National

Highway Traffic Safety Administration, U.S. Department of Transportation, DOT HS 812 102, *Traffic Safety Facts: Alcohol-Impaired Driving* 1 (2014), http://www-nrd.nhtsa.dot.gov/Pubs/812102.pdf. Depending on the method of calculation, the economic cost of that human tragedy ranges from approximately $50 billion a year to more than $200 billion. *Id.* at 2; *see also McNeely*, 133 S. Ct. at 1565 ("[D]runk driving continues to exact a terrible toll on our society."); *Sitz*, 496 U.S. at 451 ("Media reports of alcohol-related death and mutilation on the Nation's roads are legion."); *Neville*, 459 U.S. at 558 ("The carnage caused by drunk drivers is well documented . . . .").

Petitioners argue that there is no proportionality between "the right to drive" and "criminal fines and imprisonment for test refusal." Birchfield Br. 38. But that is the wrong comparison. The laws explicitly condition the right to drive based on consent "to a chemical test of that person's blood, breath, or urine for the purposes of determining the presence of alcohol [or other] controlled substance." Minn. Stat. § 169A.51(1)(a); *accord* N.D. Cent. Code § 39-20-01(1). Criminal penalties are merely the means of *enforcing* that condition; no one has to agree to go to prison in exchange for receiving a driver's license, a choice that anyone would reject. *See* Minn. Stat. § 169A.20(2); N.D. Cent. Code § 39-08-01(1)(e).

As explained next, that means of enforcement poses no additional Fourth Amendment concerns. *See infra* Part II. But the salient point for purposes of the "unconstitutional conditions" doctrine is that criminal enforcement mechanisms are just that—a means of *enforcing* the condition. They are not the condition itself. Accordingly, they have no more bearing on the

constitutionality of that condition than a city's means of enforcing trespass on a dedication required as a condition of a building permit. *Cf. Dolan*, 512 U.S. at 394-95. Which is to say: the particular means that States have chosen to enforce the condition does not bear on the "unconstitutional conditions" analysis at all.

3. In sum, the States' requirement that, as a condition of driving on the public roads, residents consent to a blood-alcohol test when an officer has probable cause to believe they were driving under the influence falls well within the bounds of this Court's prior cases. This should come as no surprise. Although the Court has yet to engage in this precise analysis, every indication from the Court's precedents points to these laws' constitutionality. When it has encountered implied consent laws in the past, the Court has praised them for "provid[ing] strong inducement to take the breath-analysis test and thus effectuate[] the Commonwealth's interest in obtaining reliable and relevant evidence for use in subsequent criminal proceedings." *Mackey*, 443 U.S. at 18. It has indicated that punishing "refus[al] to take a blood-alcohol test is unquestionably legitimate." *Neville*, 459 U.S. at 560. And, as noted, just three Terms ago, a plurality endorsed these laws—and the "significant consequences" "[s]uch laws impose . . . when a motorist withdraws consent"—as a valuable means of "enforc[ing] . . . drunk-driving laws and . . . secur[ing blood-alcohol] evidence without undertaking warrantless nonconsensual blood draws." *McNeely*, 133 S. Ct. at 1566.

Those decisions may not compel the same outcome here. But it would be a surprising development, to say

the least, if the Court were to hold that, lo and behold, these important laws were unconstitutional all along.

II. SUBJECTING PETITIONERS TO CRIMINAL PENALTIES FOR VIOLATING THE IMPLIED CONSENT LAWS DOES NOT VIOLATE THE FOURTH AMENDMENT

Petitioners seek to distinguish this Court's past approval of implied consent laws on the ground that in the earlier cases, the contemplated penalties for refusing to submit to the consented-to test were revocation of a driver's license or use of the refusal as evidence at trial, whereas the penalties here are criminal—essentially the same punishment available for the offense (drunk driving) petitioners sought to evade. *See* Birchfield Br. 40. Even if a State can constitutionally require advance consent to a blood-alcohol test as a condition of driving on the State's roads, petitioners contend, the State cannot impose criminal penalties for drivers who accept the benefit (permission to drive on the roads) and then later renege on the condition (consent) when it becomes inconvenient. That argument should be rejected.

Petitioners cite nothing in arguing that the Constitution distinguishes in this context between evidentiary and administrative penalties, on the one hand, and criminal penalties, on the other. They simply claim that "it should be obvious." *Id.* *Amici* are aware of no cases in which this Court has held that a permissible constitutional condition becomes impermissible based solely on the particular enforcement mechanism a State attaches to it. Nor would such a holding make sense: If a State may constitutionally require its citizens to do X (here, submit to a blood-alcohol test as a condition of utilizing

public roads), nothing in the Constitution says that the State can only enforce that requirement through civil and administrative mechanisms, but not criminal ones. The Eighth Amendment sets the outer bounds of permissible penalties, but within that broad range the Constitution allows States to experiment with the optimal means of enforcement to protect their citizens, as the States have done in prescribing a range of penalties under the implied consent laws. U.S. Const. amend. XVIII.

Moreover, in reneging on their consent, petitioners sought to evade prosecution for the criminal offense of drunk driving by depriving the State of a blood analysis that would confirm that their blood-alcohol level exceeded the legal limit—which *automatically* triggers a conviction for drunk driving. *See* N.D. Cent. Code § 39-08-01(1)(a); Minn. Stat. § 169A.20(5). The laws at issue simply set the punishment for reneging on a driver's consent at the same level as the punishment for the offense from which they are seeking to evade prosecution by refusing to take a blood-alcohol test. *See* N.D. Cent. Code § 39-08-01(1)(a), (e), (2), (5) (punishing test-refusal as equivalent to driving with a blood-alcohol level of at least .08); Minn. Stat. §§ 169A.03, 169A.20(2), 169A.26 (punishing test refusal as equivalent to driving with a blood-alcohol level of .16).[6] No State of which we are aware sets the

---

[6] The punishment for such crimes in both States is graduated based on the number of previous convictions. *See* Minn. Stat. §§ 169A.275-76; N.D. Cent. Code § 39-08-01(5). The minimum punishment for a first offense under North Dakota law is a $500 fine and "an order for addiction evaluation by an appropriate licensed addiction treatment program." N.D. Cent. Code § 39-08-01(5)(a)(1).

punishment at a greater level than the punishment for some form of drunk driving itself.

A hypothetical illustrates the flaws with petitioners' position: Citizen A and Citizen B both apply for driver's licenses. Neither is willing to submit to a Breathalyzer if he is pulled over by an officer who has probable cause to believe that he is driving drunk. Citizen A is forthright about this, and the State therefore denies him a driver's license. Citizen B, by contrast, stays mum and receives a license. Citizen A and Citizen B meet at a bar and have several cocktails. Both make the wrongheaded decision to drive home instead of taking Uber. Both are pulled over. Both—knowing that they are certain to fail—refuse to take Breathalyzers. Both evade a conviction for driving under the influence because the police were unable to secure the key evidence needed for conviction.

No one would dispute that Citizen A could be criminally punished for a criminal offense of driving without a license. But under petitioners' view, Citizen B cannot be criminally punished for refusing to take a Breathalyzer test. Instead, the State would be limited to suspending Citizen B's license. That puts Citizen B in a *better* position than Citizen A, because Citizen B is in the same position *after* his decision to drive drunk (*i.e.*, he no longer has a license) that Citizen A was in *before* he decided to drive (*i.e.*, without a license). In effect, petitioners' rule creates an incentive for residents to accept a government benefit when they have no intention of complying with the State's constitutionally permitted reciprocal condition, knowing that if they are caught the worst that will happen to them is that they will lose a privilege they should not have received in the first place.

Petitioners' rule also could have collateral consequences. Federal, state, and local governments routinely (and legitimately) provide citizens with benefits in exchange for their agreement not to exercise certain constitutional rights, and may enforce those choices with criminal penalties. For example, this Court has endorsed the use of non-disclosure requirements to protect the confidentiality of judicial misconduct proceedings. *See Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 845 (1978). A private citizen who learns the details of those proceedings may have a First Amendment right to publish them, *see id.* at 838, but a citizen who agrees to work for a Judicial Misconduct Commission can be required as a condition of employment to agree not to exercise that First Amendment right. And if the employee subsequently goes back on that agreement and engages in speech that would be protected if voiced by a private citizen, the State can prosecute the violation as contempt. *See id.* at 841 n.12.

Under petitioners' view, however, the State could do nothing more than terminate the employment of an employee who revealed confidential information by "exercising First Amendment rights"—or, in other words, just take away the benefit that the employee accepted in exchange for foregoing a limited exercise of First Amendment rights in the first place.[7]

---

[7] For the reasons offered in the text, a State may impose criminal penalties on drivers who renege on their promise to submit to a blood alcohol test. It follows that a driver's *submission* to a test (like petitioner Beylund's) is not rendered involuntary merely because officers notify him at the time of the test that—as he was presumed to know already—refusing to submit will result in criminal penalties. *See Neville*, 459 U.S. at

III. THE IMPLIED CONSENT LAWS PASS THE ULTIMATE FOURTH AMENDMENT TOUCHSTONE OF REASONABLENESS

"[T]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State." *Winston v. Lee*, 470 U.S. 753, 760 (1985) (quoting *Schmerber*, 384 U.S. at 767). The Fourth Amendment therefore requires a balancing between the "interests in human dignity and privacy," *Schmerber*, 384 U.S. at 769-70, and "the community's need for evidence," *Winston*, 470 U.S. at 760. Even in cases where this Court has held that the latter outweighs the former, it has recognized the significant costs to "personal and deep-rooted expectations of privacy" that such searches entail. *Id.* at 760. As the Court explained in *McNeely*, "any compelled intrusion into the human body implicates significant, constitutionally protected privacy interests." 133 S. Ct. at 1565. That intrusion may be *legitimized* by a warrant, but it is not *lessened* by one.

Implied consent laws were enacted as a means of respecting these privacy and dignitary interests. In *Schmerber*, this Court held that States may take *forced*, nonconsensual blood draws in certain circumstances where there is probable cause to suspect drunk driving. 384 U.S. at 770-72. But "faced with the prospect . . . that recalcitrant offenders would have to be restrained while blood was drawn," States enacted implied consent laws as a way "to avoid forced blood draws." Robert B. Voas et al., *Implied-Consent Laws:*

---

563 ("[T]he offer of taking a blood-alcohol test becomes no *less* legitimate when the State offers a second option of refusing the test, with the attendant penalties for making that choice.").

A Review of the Literature and Examination of Current Problems and Related Statutes, 40 J. Safety Research 77, 78 (2009). All States, and the federal government, have had implied consent laws for decades, and this Court has repeatedly referred to such laws in approving terms—not once suggesting that they raised lurking Fourth Amendment concerns.

Initially, States viewed license suspensions as a sufficient response (and deterrent) to address drunk driving, and set the penalties under implied consent laws to match. *Id.* But over time, States have recognized the need to fight drunk driving more aggressively. Gone are the days of a slap on the wrist. Today many States have imposed jail time and substantial fines for those convicted of driving under the influence, and adopted enhanced penalties for offenders with especially high blood-alcohol content. And as they have done so, a growing number of States have adjusted the penalties for test refusal so that they track the punishment for the underlying offense.

If the Court holds that these criminal penalties somehow violate the Fourth Amendment, the result will be not only to create an incentive for motorists to renege on their consent, but ultimately to encourage *more* "compelled intrusion[s] into the human body" in search of evidence, not fewer. *McNeely*, 133 S. Ct. at 1565. Suspects will view the prospect of *civil* penalties for reneging on their consent as the better option than the *criminal* penalties that accompany a drunk driving conviction. And law enforcement, in turn, will need to *force* blood draws to ensure that drunk driving can be criminally prosecuted. That is not a result that the framers of the Fourth Amendment would relish.

The implied consent laws further safeguard Fourth Amendment interests by providing that officers must have probable cause to believe that a suspect was driving under the influence in order for the test refusal penalties apply. Thus, while the laws do not require officers to secure a warrant on the spot—because they are not *forcing* a nonconsenting suspect to submit to a search—the laws only apply to circumstances where a motorist has been stopped because the officers had probable cause to believe there was drunk driving.

These considerations only bolster the conclusion that the implied consent laws meet the Fourth Amendment's ultimate touchstone of reasonableness.

CONCLUSION

The judgments below should be affirmed.

Respectfully submitted,

LISA SORONEN
State & Local Legal Center
444 N. Capitol St., NW
Suite 515
Washington, DC 20001
(202) 434-4845

GREGORY G. GARRE
Counsel of Record
JONATHAN Y. ELLIS
BENJAMIN W. SNYDER
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
Gregory.Garre@lw.com

Attorneys for Amici Curiae

March 22, 2016